BEFORE THE
STATE EMPLOEES' APPEALS COMMISSION

IN THE MATTER OF	)	
	)	
M.W.	)	ISSUED
Petitioner,	)	
	)	SEAC No. 04-17-027 FEB 13 2019
vs.	)	
	)	STATE EMPLOYEES'
INDIANA DEPARTMENT OF CHILD	)	APPEALS COMMISSION
SERVICES	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER

I. Introduction and Summary

This administrative review is conducted pursuant to Ind. Code § 4-15-2.2 *et seq.* (the "Civil Service System") and Ind. Code § 4-21.5-3 *et seq.* ("AOPA").[1] The operative pleading is Petitioner M.W. ("Petitioner") Complaint filed April 26, 2017, with the State Employees' Appeals Commission ("SEAC") against Respondent Indiana Department of Child Services ("Respondent"). Petitioner was a classified (just cause) employee working as a Family Case Manager Supervisor 4 ("FCMS") for Respondent at the time of her termination. The issue before SEAC is whether Petitioner was terminated for just cause.[2]

An evidentiary hearing in this matter was held on November 28, 2018, before the undersigned Chief Administrative Law Judge. Petitioner M.W. appeared by counsel, Mr. Glen Koch II. Respondent appeared by counsel, Ms. Rachel Russell and Ms. Whitney Fritz. Following the hearing, the ALJ gave each party an opportunity to file proposed findings of fact and conclusions of law, which Petitioner and Respondent did on January 11, 2019. Having reviewed the arguments, witness testimony, admitted evidence, applicable law, and proposals, and being duly advised, the ALJ issues the following Findings of Fact, Conclusions of Law, and Non-Final

[1] Commission proceedings are additionally governed by the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 et seq. See I.C. § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. § 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings.

[2] *See,* Ind. Code § 4-15-2.2-23(a) (stating that a classified employee who has successfully completed a working test period may be dismissed only for just cause).

Order. Respondent was unable to prove by a preponderance of the credible evidence that Petitioner's termination was for just cause. Judgment for Petitioner.

II. Legal Standard

This is a classified (just cause) case under the Civil Service System. A state agency may only terminate or take material adverse employment actions against a classified state employee for just cause. I.C. § 4-15-2.2-23. In a disciplinary case involving a classified employee the state agency has the initial and ultimate burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. Ind. Code § 4-15-2.2-42(g); *see also* Non-Final and Final Orders in *Miller v. FSSA*, SEAC No. 05-12-060 (2012); Non-Final and Final Orders in *Cole v. DWD*, SEAC No. 02-12-019 (2013); Non-Final and Final Orders in *Johnson v. DWD*, SEAC No. 05-13-034 (2014). Therefore, if the Respondent fails to establish just cause, the challenged adverse employment action is invalid.

To establish just cause, the Respondent may refer to the Petitioner's work performance or service rating. I.C. § 4-15-2.2-36(e). An agency's service ratings and employee performance standards "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." *Id.* Therefore, in determining whether just cause was established, SEAC may consider Petitioner's performance as compared to the Respondent's employee performance standards. I.C. § 4-15-2.2-12, 36 and 42.

Additionally, the inquiry focuses on the reasonableness of the employer agency's workplace expectations. Employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. *See Miller, Cole and Johnson*, supra. The reasonable expectations of the Respondent may include its communicated employee performance standards and expected outcomes. *Id.* The just cause standard requires the Respondent to act with reasonableness, not perfection. *See Conklin v. Review Bd. of DWD*, 966 N.E.2d 761, 764 (Ind. Ct. App. 2012); *Ghosh v. Ind. State Ethics Com'n*, 930 N.E.2d 23 (Ind. 2010); *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992) (just cause standards in other contexts in Indiana similarly looks to the reasonable expectations of the employer).

At-will employment is the default in Indiana, and most state employees are considered unclassified in that regard. I.C. §§ 4-15-2.2-22, 24. However, the General Assembly also recognized some employees as classified given federal regulations and laws but did not define "just cause" in the Civil Service System. Therefore, the ALJ first looks to Indiana law, but also to the federal standard. The federal employment just cause standard is defined as "[s]uch cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). *See also Free Enterprise Fund v.*

PCAOB, 561 U.S. 477, 477 (2010) (federal system looks at factors such as inefficiency, neglect of duty, and reasons provided by the legislature).

If an agency establishes just cause, "the [C]ommission shall defer to the appointing authority's choice as to the discipline imposed . . ." I.C. § 4-15-2.2-42(g). The ALJ is not authorized to substitute his own judgment after the agency proves it had just cause to impose the adverse employment action.

III. Findings of Fact

1. Petitioner began employment with Respondent in 2006, as a Family Case Manager ("FCM") in Respondent's Monroe County Office (Pet'r Test.).

2. Petitioner left her position as an FCM in 2010, and returned after approximately six (6) months (Pet'r Test.).

3. In 2015, Petitioner was promoted to a Family Case Manager Supervisor ("FCMS") at the Monroe County Office (Pet'r Test.).

4. On January 16, 2017, FCM B.L. was tagged in a Facebook post entitled "The 'I'm a lesbian fuckboy' starter pack" (Pet'r Ex. 1).

5. B.L. "liked" the post and replied saying "3rd person to send me this within like 2 days lol…I do own majority of these items lmao even down to the NEFF beanie lmao [sic]" (Pet'r Ex. 1).

6. On January 18, 2017, Petitioner texted FCM K.M. about the post on B.L. Facebook page, asking, "[s]o is B.L. trying to turn into a guy or what?" and also indicating that she "just notice[d] B.L. has been wearing men's shoes and pants." (Pet'r Ex. 2; K.M. Test.).

7. K.M. indicated that B.L. "is the man in her relationship", that B.L. had "gained a lot of weight since she started" and the fact that men's clothes are typically more comfortable (Pet'r Ex. 2; K.M. Test.).

8. On January 19, 2017, Petitioner was talking to FCM K.K. and FCM C.D. C.D. in K.K. cubicle (Pet'r Test.; Resp't Ex. R).

9. B.L. approached the group and engaged in conversation (Resp't Ex. T).

10. K.K. mentioned that she saw on Facebook that B.L. had changed her relationship status and asked B.L. about her new girlfriend (K.K. ; Pet'r Test.).

11. K.K. also asked B.L. if it was the same person that had tagged B.L. in the Facebook post K.K. Test.).

12. Petitioner then stated that she had seen said post and had been meaning to ask B.L. about the term "fuckboy" (Pet'r Test.).

13. Petitioner asked B.L. if the term indicated that B.L. was considering "becoming a boy" (Pet'r Test.; Resp't Ex. Q).

14. At that point, B.L. stopped FCM N.H. , who was walking by K.K. cubicle, and asked her to join the conversation (B.L. Test.).

15. B.L. asked Petitioner several times to repeat what she had just asked B.L. after which Petitioner obliged (B.L. Test.).

16. Assessment Worker G.W. whose cubicle was nearby K.K. overheard the group, including B.L. , laughing about the Facebook post and never heard the conversation become serious or confrontational (G.W. Test.).

17. On January 19, 2017, B.L. , upon learning that K.M. and Petitioner had discussed her gender, told K.M. that she "was offended" but later that same day told K.M. that "she was messing around with [him]".

18. On January 19, and 20, 2017, several FCMs sent emails to E.B. , Respondent's Local Office Director, explaining that B.L. had come to them indicating that she was offended by Petitioner's question. (Resp't Exs. N-AA).

19. On January 20, 2017, B.L. sent E.B. an email detailing the previous day's events, indicating that she was highly offended by Petitioner's question (Resp't Ex. T; B.L. Test.).

20. On January 26, 2017, Petitioner participated in a pre-deprivation meeting and was subsequently terminated from her position as an FCMS (Resp't Ex. H).

IV. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. Ind. Code § 4-15-2.2 *et seq.* SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). Ind. Code §§ 4-15-2.2-23, 24. Petitioner was a classified employee at all relevant times.

2. Respondent's only contention is that it had just cause to issue discipline to Petitioner because her behavior and treatment of B.L. was offensive and inappropriate, rising to the level of harassment and violation of Respondent's policies.

3. Respondent's harassment policy defines harassment based on a protected class as "verbal or physical conduct that slanders or shows hostility or hatred toward an individual because of his/her protected status that: 1) has the purpose or effect of creating an intimidating, hostile, or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual's work performance; or 3) otherwise adversely affects an individual's employment opportunities." (Resp't Ex. D).

4. Respondent failed to present evidence that Petitioner's behavior interfered with any individual's work performance or that it otherwise adversely affected any individual's employment opportunities.

5. Thus, the only portion of Respondent's policy in question, as it relates to its termination of Petitioner, is whether or not Petitioner's behavior had "the purpose or effect of creating an intimidating, hostile, or offensive working environment." (Resp't Ex. D).

6. "The Seventh Circuit has drawn the following line between what is and is not objectively hostile, which is 'not always easy.'" *Slentz v. Emmis Operating Co.*, No. 1:16-cv-02568-JMS-MJD, 2018 U.S. Dist. LEXIS 18300 (S.D. Ind. Feb. 5, 2018) (citations omitted). "On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 685 (7th Cir. 2010); *See also Slentz* 2018 U.S. Dist. LEXIS 18300 at 21 (holding that an employee joking about another employee's sexuality to "most of the employees on the sixth floor" and referring to her as "stupid and a bitch" failed to be "severe or pervasive enough to rise to the level of a hostile work environment.").

7. Whether the alleged harassment rises to a level "severe or pervasive enough to create a hostile work environment . . . turns on a constellation of factors that include 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Turner*, 595 F.3d at 685 (citations omitted).

8. "Further, a claim for a hostile work environment must be tested both objectively and subjectively. That is, the plaintiff must subjectively believe that the harassment was sufficiently severe or pervasive to have altered the working environment, and the harassment must also be sufficiently severe or pervasive, from the standpoint of a reasonable person, to create a hostile work environment." *Id.* (citations omitted).

9. "In addition to the questions of severity and pervasiveness, in determining whether an environment is sufficiently abusive to be actionable, courts are guided by factors such as whether conduct is physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with an employee's work performance." *Cole v. Bd. of Trs.*, 838 F.3d 888, 897 (7th Cir. 2016). Further, the behavior being accused of constituting harassment should be "taken as a whole", not in a vacuum. *Turner,* 595 F.3d at 685.

10. While it is true that agencies are allowed to promulgate their own rules and policies and that "[t]he agency is free to interpret its own regulations with or without notice and comment . . . courts will decide—with no deference to the agency—whether that interpretation is correct. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *See* Administrative Procedure Act, 5 U.S.C. §§ 552 and 553; The ALJ here finds that Respondent's interpretation of its harassment policy in regards to Petitioner's termination is near nonsensical.

11. Respondent attempts to use the testimony of SPD Program Director [redacted] S.B. ("[redacted] S.B. [redacted]") to convince the ALJ that an employee's conduct, despite intention—or even knowledge—on their part, can rise to the level of harassment under Respondent's policy. On one hand, [redacted] S.B. [redacted] testified that there are both objective and subjective standards used in interpreting the harassment policy and that a reasonableness component exists. However, [redacted] S.B. [redacted] also indicated that the intent of the harasser is "completely irrelevant" and what is definitive is how the behavior is received ([redacted] S.B. [redacted] Test.).

12. In an illustration to this effect, S.B. indicated that if an employee were to have an offensive sign placed, unbeknownst to them, on their back, that same employee could still be considered in violation of the harassment policy if other people are offended by it (S.B. Test.). S.B. then indicated that an investigation would be completed to determine who put the sign on the employee's back and such investigation could determine if the employee who had the sign placed on them was to be disciplined for the behavior. Not only is the ALJ wholly unconvinced that this line of thinking can arise to what a reasonable person would consider harassment or the creation of a hostile work environment at the fault of the employee, but S.B. through her own example, illustrates how intent does in fact play a factor in determining whether or not an employee's behavior or actions rise to the level of harassment under Respondent's policies.

13. "Ultimately, to satisfy the 'severe or pervasive' prong, an employee must show that the work environment was both subjectively and objectively offensive. In other words, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. Unpleasant or boorish behavior is not prohibited by the law." *Treat v. Tom Kelley Buick Pontiac GMC, Inc*, No. 1:08cv173, 2010 U.S. Dist. LEXIS 42811 (N.D. Ind. Apr. 30, 2010) (citations omitted).

14. While Petitioner was aware of her actions—questioning B.L. —the ALJ fails to see that those actions in and of themselves, particularly when viewed in the appropriate context, were severe, pervasive, intimidating, or threatening in a manner that arose to a level constituting harassment. *See Watkins v. Henderson*, IP 99-1945-C-B/S, 2001 U.S. Dist. LEXIS 2523 (S.D. Ind. Mar. 5, 2001) (concluding that, in part, an employee's relatively isolated comments about other coworkers being gay and referring to them as "fags" did not support a claim for a hostile work environment); *See also Walton v. Van Ru Credit Corp.*, No. 10-344, 2011 U.S. Dist. LEXIS 138560 (N.D. Ill. Dec. 2, 2011) (stating that even if homosexual based comments were subjectively offensive, when there was no physical touch, bodily exposure, or fear, the objective standard is not satisfied; unpleasant conduct does not necessarily equate to harassment or a hostile environment).

15. Further, several of Respondent's employees were friends on Facebook (thus allowing them to see each other's posts), including B.L. and Petitioner. Thus, a sensible person would assume that B.L. would have been aware that any Facebook postings would be viewable by her coworkers. B.L. for reasons unknown, chose this one particular time to be offended by a question regarding her sexuality.

16. Similarly, K.K. and B.L. previously had "extensive conversations about sexual orientation" where K.K. asked several questions about homosexuality and B.L. responded openly (Resp't Ex. R; K.K. Test). No evidence was presented to indicate that B.L. felt uneasy, let alone offended or harassed, at being asked about her sexuality by K.K.

17. In addition, B.L. seemingly baited Petitioner into repeating the question several times to other coworkers who walked by, as if wanting to show that only the Petitioner in particular was talking about B.L. sexuality. It stands to reason that if B.L. and other coworkers were truly offended and felt harassed by the conversation, they would not have continued to engage in the conversation, ask Petitioner to repeat the question several times, or have similar conversations without Petitioner on a regular basis.

18. It was undisputed that B.L. had previously discussed her sexual orientation with several other employees (B.L. Test.). These employees also asked questions specifically directed towards B.L. about her sexuality. *See* K.K. B.L. Test. However, it was not until Petitioner's question did B.L. state that she was offended.

19. The ALJ finds that Petitioner's behavior, taken as a whole and in the appropriate context, did not constitute harassment per Respondent's policy. Therefore, Respondent did not prove just cause in terminating Petitioner's employment.

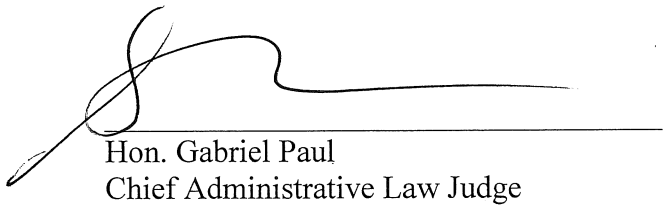
Prior sections are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed a conclusion of law, or a conclusion of law is deemed to be a finding of fact it shall be given such effect.

V. Non-Final Order

Judgment is entered in favor of Petitioner and hertermination is hereby **REVERSED**. The Parties shall bear their own fees and costs and Respondent shall reinstate Petitioner to its agency in the same or similar position she held before her termination in advance of the next regularly-scheduled pay period.[3]

[3] The ALJ is aware that the State groups employees into two (2) different payroll cycles. Since the ALJ is unaware of which cycle Petitioner was a part, he orders Respondent to reinstate Petitioner in advance of the next regularly-scheduled start of Petitioner's former pay period. Also, during the hearing, Petitioner testified that since her termination, she has taken a new position outside of Respondent's agency and also received unemployment compensation through the Department of Workforce Development. To the extent that such monies earned by Petitioner since her termination fall short of Petitioner's back pay and unemployment compensation in this case, Petitioner is directed to file a Motion with the ALJ containing an accounting of said damages within fourteen (14) days of this order, after which he will allow Respondent to file a reply with its own accounting of damages. Otherwise, the ALJ will assume that Petitioner's sole remedy is reinstatement to Respondent's agency, along with such leave and retirement balances as Petitioner had earned as of the date of her termination. Of course, the Parties are free to negotiate any settlement in light of this ruling which does not involve reinstatement. If so, the Parties shall file a Motion requesting a stay within fourteen (14) days of this ruling.

DATED: February 13, 2019



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